Supreme Court, U.S.
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ALEXANDER L. STEVAS

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No. 84-1699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT SEABOARD SYSTEM RAILROAD, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Reflecting Congressional recognition of the adverse effects of inconsistent, prejudicial, and uneconomic state regulation of railroads[1] the Staggers Rail Act of 1980[2] provided that state regulatory agencies could exercise jurisdiction over intrastate rates only if they did so in accordance with federal law. That act further provided for Interstate Commerce Commission review of decisions of state regulatory agencies to determine whether or not the standards and procedures applied by said agencies were in fact in accordance with federal law and for appropriate ICC action overturning state decisions when the required conformity with federal law was found to be lacking. The basic issue in this case is whether or not the ICC properly exercised its authority in overturning a particular decision of the Public Service Commission of Indiana. The questions presented are:

1. Did the Court of Appeals err in affirming ICC reversal of a decision of the Public Service Commission of Indiana prescribing a maximum reasonable intrastate rail rate when the Indiana Commission gave controlling importance to suspect findings concerning the involved railroad's efficiency and little if any weight to statutorily mandated considerations regarding that carrier's revenue adequacy?

2. Did the Court of Appeals err in concluding that the Indiana Commission violated the provisions of the Staggers Act even though the ICC had not adopted a national standard of revenue adequacy?

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[1]H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 61 (1980).
[2]Pub. L. No. 96-448, 94 Stat. 1895, codified at 49 U.S.C. 10101a, *et seq.*

3 . Did the ICC's decision reversing the Indiana Commission encroach on the role reserved to states by the Staggers Act?

4 . Did the ICC and Court of Appeals decisions properly interpret the maximum rate reasonableness standards of the Interstate Commerce Act, as amended by the Staggers Act?

RULE 28.1 STATEMENT

Respondent Seaboard System Railroad, Inc. is a wholly owned subsidiary of CSX Corporation. Listed below are companies related to the Respondent and its parent:

Allegheny & Western Railway Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Eastern Hardwoods, Incorporated
Fruit Growers Express Company
Home Avenue Railroad Company
Littleton Fuel Company
Mid Allegheny Corporation
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
New Gauley Coal Corporation
North Charleston Terminal Company
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia RR Co.
The Cleveland Terminal & Valley RR Company

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MISCELLANEOUS AUTHORITIES

H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 61 (1980) . . . . . (i)

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STATEMENT OF THE CASE

Respondent Seaboard System Railroad, Inc. ("Seaboard") hereby adopts the "Statement of the Case" set forth in the "Brief in Opposition" filed by Respondents Interstate Commerce Commission and United States of America.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The questions presented for review do not raise any issues of sufficient significance to merit review by this Court.

The questions presented for review[3] clearly do not merit review by this Court since they deal with matters which are fact bound, relate to non-issues, and involve technical subjects squarely within the purview of the Interstate Commerce Commission's ("ICC") expertise. There is also no reason to review the Court of Appeals' decision since, as a review of the record clearly reveals, the ICC order it affirmed overturned precisely the sort of misguided state agency decision that necessitated the enactment of 49 U.S.C. 11501. The ICC acted within the proper scope of its appellate jurisdiction to ensure conformity with federal law and the Court of Appeals properly affirmed.

Subsection (b) of 49 U.S.C. 11501 provides that a state authority may exercise jurisdiction over intrastate rail transportation only if it does so in accordance with the provisions of the Interstate Commerce Act, and subsection (c) of that statute authorizes the ICC to overturn a state agency decision when it finds that the involved state agency applied standards and procedures which were not in accordance with federal law. The Court of Appeals' careful scrutiny of the record compelled it to affirm the ICC's exercise of its 11501 (c) authority. The Court's perceptive comments clearly underscore the basic unfairness of the Indiana proceeding and the Indiana Commission's failure to act in accordance with federal law:

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[3]Seaboard has slightly modified the questions presented by Petitioner to provide a more balanced statement of the involved issues. For instance, the fourth question presented by Petitioner clearly begged the question by incorporating the invalid premise that the ICC and the Court of Appeals had failed to provide balanced regulatory protection for captive traffic.

> In our view, the approach of the Indiana Commission to this case falls well short of evenhanded, correct and faithful application of federal standards. The state's handling of the case is so one-sided as to appear to have been purely result-oriented - the desired result being the lowest possible rate. *Public Service Co. of Indiana, Inc. v. ICC,* 749 F.2d 753, 763 (D.C. Circ. 1984).

In the final analysis, the pervasive unfairness of the state proceeding clearly called for the sort of decisive action taken by the ICC pursuant to 49 U.S.C. 11501.

The first question presented was restated by Seaboard as follows:

> Did the Court of Appeals err in affirming ICC reversal of a decision of the Public Service Commission of Indiana ("Indiana Commission") prescribing a maximum reasonable intrastate rail rate when the Indiana Commission gave controlling importance to suspect findings concerning the involved railroad's efficiency and little if any weight to statutorily mandated considerations regarding that carrier's revenue adequacy?

This Court's consideration of that question would be inextricably bound to the unique decision making process followed by the Indiana Commission. The state agency's decision making process was described as follows by the Court of Appeals:

> The state commission apparently decided to believe all of the shippers' cost evidence, and to disbelieve all of the railroad's cost evidence, and to end up arriving at the lowest possible cost figure. Next, the Indiana Commission acknowledged, as it was bound to do, that the ICC had determined the L&N[4] to be revenue inadequate. The state

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[4]Respondent Seaboard is successor in interest to L&N - Louisville and Nashville Railroad Company.

> went on, though, to hold that the authority of the L&N to utilize differential pricing was further contingent on its demonstrating its efficiency. Having diverted the case onto the solitary "efficiency track," the Indiana Commission then compared the L&N to the Southern which has a reputation as one of the nation's most efficient railroads, disbelieved all of the L&N's evidence, and ultimately found it to be "inefficient." Finally, on that basis, the state commission reduced the existing rate to the jurisdictional threshold - the lowest level permitted by law. *PSI,* 749 F.2d at 763.

The involved state agency decision was thus patently unfair and inconsistent with federal law, and the first question presented is inescapably tied to that particular decision.

The second question presented by Petitioner was restated as follows by Seaboard:

> Did the Court of Appeals err in concluding that the Indiana Commission violated the provisions of the Staggers Act even though the ICC had not adopted a national standard of revenue adequacy?

In reality, this question does not present a legitimate issue for consideration. Petitioner raised a similar argument before the Court of Appeals, and that Court responded with the following comments:

> The problem with the petitioners' argument, though, is that the ICC found that the approach of the Indiana Commission violated the provisions of the Staggers Act, *not* ICC revenue adequacy standards. The Act itself establishes federal standards that must be observed. *PSI,* 749 F.2d at 769.

The Court was clearly correct in that observation since the plain language of 49 U.S.C. 11501 (c) provides that the ICC shall overturn a state agency's order if said agency applied standards and procedures which "were not in accordance with

the provisions of *this subtitle* . . . ." (emphasis supplied).

The third question presented may be stated as follows:

Did the ICC's decision reversing the Indiana Commission encroach on the role reserved to states by the Staggers Act?

Again, this questions calls for considerations which are inevitably tied to the facts of this case, and as was previously discussed, the facts of this case show that it was a classic example of the sort of misguided state action which necessitated enactment of the governing sections of the Staggers Act. Thus, the ICC did not improperly encroach upon areas reserved to the state, but rather fulfilled its statutory mandate to remedy state action which was not in accordance with federal law. Where, as here, state agencies fail to heed the mandate of binding federal standards, they forfeit a legitimate role in intrastate rail regulation.

Petitioner's "encroachment" argument calls to mind some of the Seventh Circuit's concluding language in *Indianapolis Power and Light Co. v. ICC,* 687 F.2d 1098 (7th Cir. 1982), a case which also involved the Indiana Commission:

> When all is said and done, IPL[5] PSI, and NARUC are basically challenging the wisdom of the new national railroad regulatory policy embodied in the Staggers Act. They prefer the earlier statutory scheme which vested more power in state agencies. They seek to preserve that scheme, in the face of Congressional dismantling of it, by arguing that the statute does not mean what it says . . . *IP&L,* 687 F.2d at 1105.

The fourth question presented may be fairly restated as follows:

> Did the ICC and Court of Appeals decisions properly interpret the maximum rate reasonableness standards of the Interstate Commerce Act, as amended by the Staggers Act?

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[5]Indianapolis Power and Light Co.

Consideration of this question would again be fact-bound, and it raises various technical issues which are squarely within the purview of the ICC's expertise. It is also apparent that the ICC properly determined the appropriate rate for the involved movement. Unlike the Indiana Commission which relied solely on cost evidence - and in fact, solely on PSI's cost evidence - to set the maximum reasonable rate at the lowest possible, jurisdictional threshold level, the ICC considered all of the following factors:

1. Cost evidence;
2. The reasonable range of revenue/variable cost ratios established by applicable ICC precedent;
3. The railroad's revenue inadequacy; and
4. The fact that the rate attacked by PSI was "well below that of other intrastate and *interstate* unit-train coal rates in the area." *PSI,* 749 F.2d at 770.

It is thus evident that the questions presented for review in this case do not raise significant issues which merit review by this Court. Moreover, it is likewise apparent that the decisions of both the ICC and the Court of Appeals were entirely appropriate and correct in these premises, so that even if the requested writ were issued, the Court of Appeals would ultimately be affirmed.

II. The Court of Appeals' decision is consistent with decisions of other circuits.

On pages 5 and 6 of its petition, PSI asserts that the Court of Appeals' decision conflicts with decisions of the same and other circuits, but with one exception, does not attempt to explain where such conflicts exist.

On pages 6 through 7 of its petition, PSI may be suggesting that the Court of Appeals' decision is in conflict with the Third Circuit's decision in *Wheeling-Pittsburg Steel Corp. v. ICC,* 723 F.2d 346 (3rd Cir. 1983). In the quoted excerpts from that

Third Circuit decision, one finds that the states still play a role in intrastate rail rate regulation and that in preempting state rate orders for non-conformity with federal standards or procedures, the ICC must make the basis for its prescription order clear. These principles are not in conflict with any statements of the Court of Appeals in the decision below. In fact, the operative findings in *Wheeling-Pittsburgh* are entirely consistent with the D.C. Circuit's findings in *PSI.* For example, the Third Circuit found that state regulatory authorities do not exercise a measure of discretion in interpreting federal standards and procedures under the Interstate Commerce Act and that the ICC's review is plenary with respect to questions of law as to whether state authorities have complied with federal standards or procedures. *Wheeling-Pittsburgh,* 723 F.2d at 353-55.

Although it does not specifically mention them in the context of an alleged conflict, PSI cites two other D.C. Circuit opinions in support of its arguments. First of all, on page 9 of its petition, PSI cites *Coal Exporters Association of the United States, Inc. v. ICC,* 745 F.2d 76, 98 (D.C. Cir. 1984) for the principle that Congress was concerned that monopolistic rail carriers not extract excessive profits from captive traffic as to which regulation was preserved. On pages 10 through 11 of its petition, PSI also cites *Farmers Union Central Exchange, Inc., v. Federal Energy Regulatory Commission,* 734 F. 2d 1486 (D.C. Cir. 1984) for the principle that "the most useful and reliable starting point for rate regulation is an inquiry into costs." *Farmers,* 734 F. 2d at 1502.

Again, neither of those principles conflict with the Court of Appeals' decision in *PSI.* The Court of Appeals noted that in determining the appropriate rate for the involved movement, the ICC not only considered costs, but also several other pertinent factors bearing on reasonableness. Thus the ICC did consider cost evidence in *PSI,* along with other factors pertinent to the determination of an appropriate - *i.e.,* non-excessive - rate.

In its only clear assertion of a specific conflict, PSI on page 12 of its petition alleges that the Court of Appeals decision below is entirely irreconcilable with that of the Sixth Circuit in *Kentucky Utilities Co. v. ICC,* 721 F.2d 537 (6th Cir. 1983). As the Court of Appeals noted in *PSI,* however, there is a clear distinction between *Kentucky Utilities* and this case. The Court explained this distinction thusly:

> [In *Kentucky Utilities*] the ICC reversed the Kentucky [Railroad] Commission for using a rate method which, *though consistent with the Staggers Act,* differed from the formula *subsequently* approved by the ICC . . . . Here, the ICC has found the state decision to be in direct violation of the Staggers Act and the balancing approach that it entails. The ICC is challenging not the use or misuse of a particular rate formula, but rather the misinterpretation of the statute, the failure to balance faithfully and fairly the *statutory* factors. *PSI,* 749 F. 2d at 769-70. (emphasis supplied, in part)

This succinct statement by the Court of Appeals clearly shows that *PSI* and *Kentucky Utilities* are not in conflict, but rather, distinguishable.

CONCLUSION

For the foregoing reasons, PSI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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